IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GARY WASHINGTON, Plaintiff v. BALTIMORE POLICE DEPARTMENT, *et al.,* Defendants	Case No. 1:19-cv-02473-GLR Judge Stephanie Gallagher **JURY TRIAL DEMANDED**

EXHBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

GARRETH PARKS, Civil No. TDC-18-03092

Plaintiff,

v. Greenbelt, Maryland

BALTIMORE POLICE DEPARTMENT, et al., September 6, 2019

Defendants. 9:30 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE THEODORE D. CHUANG
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE CLERK: The matter now pending before this Court is Civil Number TDC-18-3092, Parks versus Baltimore Police Department, et al. We're here today for a motions hearing. Counsel, please identify yourself for the record.

MS. HORN: Your Honor, Gayle Horn, H-O-R-N, on behalf of the plaintiff, Mr. Parks.

THE COURT: Good morning.

MS. SPENCE: Good morning. Renee Spence on behalf of the plaintiff, Mr. Parks.

MS. ROCHE: Good morning, Your Honor. Katie Roche on behalf of the plaintiff, Garreth Parks.

THE COURT: Good morning.

MR. DAHL: Good morning, Your Honor. Christopher Dahl, Baker Donelson. I am joined by Neil Duke, who is seated behind me. Together, we represent 16 of the individual defendants, Blane Vucci, Gordon Carew, Joseph Mueller, Kimberly Parks, Todd Tugya, Paul Dean --

(The court reporter asked Mr. Dahl to slow down.)

MR. DAHL: Sure. Blane Vucci, Gordon Carew --

THE COURT: Can I just ask that counsel stand when they address the Court, please?

MR. DAHL: Sure. Blane Vucci, Gordon Carew,

Joseph Mueller, Kimberly Parks, Todd Tugya, Paul Dean, Jennifer Grant, personal representative of the estate of Barry Grant, Joseph Jefferson, Brian Horton, Tom Pfeiler, Brian Ford, Kevin Buie, John Riddick, Joseph Phelps, Ray Laslett and Donald Watson.

THE COURT: Okay. Good morning. And the other counsel -- just for the record, do I have all the names of counsel on the record or not?

MS. LYNCH: I believe so, Your Honor. I'm Kara Lynch on behalf of the Baltimore Police Department.

THE COURT: Okay.

MR. NATHAN: My name is Shneur Nathan. I represent the same individual defendants that Mr. Dahl mentioned and also the estate of Mr. Hagee.

THE COURT: Okay. So we're here for a motion -- a hearing on the motion to dismiss -- motions to dismiss. I think there's a number of issues here. We do have arguments on behalf of the individual defendants. We also have the argument by the department.

I also have this letter regarding another proposed motion and we may be able to discuss this at the end of the hearing. But given how far we have moved through the issues -- at least I have moved through the issues on the motion, I plan to address these issues separately. I think there's no reason why we couldn't

even rule on the motions that are pending without prejudicing any argument that might be made in this separate letter. So we'll take these things one at a time.

We'll start with the motions. I have some questions for the parties. But I know that you may have other things you want to offer. So I'll ask the moving parties, in this case the defendants to go first, give the plaintiffs roughly equal time and then some very brief opportunity for rebuttal.

I would ask since there is multiple issues that when I say equal time, that collectively all the issues for the defendants collectively would be both sides would have equal time.

And so notionally, I am thinking about 20 minutes a side. Don't know how you want to divide that or if you want to divide that. If I go over because I have additional questions, then obviously, I'll try to give the other side equal time as well. So who would like to go first?

MR. DAHL: Your Honor, for the record, Christopher Dahl. I'll go first for the moving individual defendants.

THE COURT: Okay. And so I take it then that you're prepared to talk about the issues in that motion.

But if I have questions about the Monell claim or this issue about the Eleventh Amendment, I should save that for who?

MS. LYNCH: Kara Lynch, Your Honor --

THE COURT: Okay.

MS. LYNCH: -- from the Baltimore Police Department.

THE COURT: Okay. Great. So go ahead, Mr. Dahl.

MR. DAHL: Thank you, Your Honor. As I stated earlier, I represent 16 of the current retired and in one case, deceased officer of the Baltimore Police Department, who are among those collectively referred to as the individual defendants in the complaint.

This action as the Court is aware arises from a homicide and nonfatal shooting on July 16, 1999 for which the plaintiff was convicted. Sixteen years later, he was granted a new trial and eventually, the charges were dismissed and subsequently, the plaintiff has brought suit against apparently every officer known to be at the scene or otherwise involved in the investigation and has done so on three theories.

The first and primary theory is the existence or the discovery of the so-called Mueller report, which is a document that we have attached as part of the Plaintiff's

Petition for Writ of Actual Innocence at ECF 51-2, specifically page 27, secondly, a two-sentence allegation that one or more of the officers buried the gun or guns used in the crime and third, a collective allegation of witness intimidation of the several witnesses identifying Mr. Parks as the shooter in this crime.

We need to dismiss for several reasons, but the principal one which I'll move to first is judicial estoppel as to the Mueller report and failure to plead with the requisite level of plausibility as to the balance of the plaintiff's claims.

THE COURT: So on judicial estoppel, one of the requirements is bad faith.

MR. DAHL: Yes, Your Honor.

THE COURT: And, first off, what in the complaint indicates there's bad faith and/or how is that established at the motion to dismiss stage?

MR. DAHL: It's established at a motion to dismiss stage through the use of judicial notice of the Mueller report and of the plaintiff's characterization of the Mueller report in the Plaintiff's Petition For Writ of Actual Innocence before the Circuit Court for Baltimore City. It is a material difference in the world of Brady, particularly, the world of Section 1983 Brady-based claims who withheld the document. If the document is withheld by

a police officer, then the police officer is personally liable for any incarceration under a theory of malicious prosecution. If it's withheld instead by the prosecutor, well, then the prosecutor had it, the police officer's job is done. And that was -- been recently set forth by the Fourth Circuit in the Owens case. And at the time of this crime notably had been recently set forth as a matter of absolute immunity by the Fourth Circuit in Jean v. Collins. That was subsequently vacated and then reinstated as a softer concurrence. But that was the law at the time and it remains the law today.

The plaintiff was quite clear when he was the criminal defendant seeking release that the Mueller report assuming authenticity says what it means. There's a note at the bottom reading "per Ms. Costley, this report is not to be released; please contact State's Attorney at 410-545-6433." And the plaintiff went above and beyond in order to paint Ms. Costley as a --

THE COURT: Well, factually speaking, if it had been the officers or if the officers had been colluding or involved in this alleged withholding, wouldn't that also have provided a basis for the conviction to be vacated?

MR. DAHL: Collusion would not under these circumstances, Your Honor. I would disagree respectfully for two reasons.

First and foremost, it's not what the plaintiff pleaded. The plaintiff did not plead a collusion case where the prosecutor was in on it and the police officers participated in that. But secondly, under the more recent opinion of Evans v. Chalmers, the Fourth Circuit has made it very clear that the independent acts of a prosecutor, even if the police were in on that act, act to cut off liability under Section 1983 is a matter of but for and proximate causation. Quite plainly, unless it has been pleaded, which it has not, that the officers misled the prosecutor or unduly pressured the prosecutor, the actions of the prosecutor from which the plaintiff is judicially estopped from pleading the contrary --

THE COURT: I guess the question I have is if the argument on the petition, the innocence petition had centered around the officers, wasn't there still a viable way to convince the Court to vacate the conviction? This isn't a situation where having officers who are withholding a report or is somehow engaged in improper conduct would have been entirely detrimental to his claim, would it? I mean if there are officers who are bearing these reports as you said, isn't there still a path to get your conviction vacated?

I guess I'm asking whether it really is that the plaintiff was acting in bad faith when whoever was

potentially at fault for this, he still had an argument to make.

MR. DAHL: Your Honor, to be quite clear, it's not necessarily our position that the plaintiff was acting in bad faith before the Circuit Court for Baltimore City. Our position --

THE COURT: Isn't that what you need for judicial estoppel?

MR. DAHL: It is not. The plaintiff is acting in bad faith today by pleading contrarily to his positions taken in the circuit court case. And my authority for that is Lowery v. Stovall. That's what the Fourth Circuit found in its central case. Not that the plaintiff had misled the circuit court by pleading guilty to a crime. But the plaintiff had misled the U.S. District Court and later, the Fourth Circuit by attempting to argue and plead contrary to the position that he had taken in the underlying matter and essentially prevailed on.

We have that case. We in fact have a stronger case than Lowery v. Stovall on judicial estoppel in that way because this is not a case where -- like Lowery v. Stovall, this is an adopted set of state of facts. These are the facts that the plaintiff took, put before the Circuit Court for Baltimore City, argued painstakingly over dozens of pages that this was a notoriously corrupt

prosecutor who suborned perjury by allowing witnesses to testify that Burgess was not the shooter. That's a serious statement. That means that the prosecutor had this document in advance. Factually is that true? Don't know. It doesn't matter for judicial estoppel --

THE COURT: Okay. Let's move on to the statute of limitations thing because we have limited time.

MR. DAHL: That's fine.

THE COURT: So is it your argument then that there are -- why isn't this covered more by a situation of Heck in which we need to wait until we actually know that these convictions are vacated and that there's no potential prosecution coming forward in terms of how I find the date on which the clock begins to run?

MR. DAHL: Absolutely. Well, for statute of limitations to be clear, there is only one federal count, a federal count to which Heck would apply and which we have moved in our papers. That's Count Three for unlawful detention. And that is covered by Wallace v. Kato. Okay. The statute of limitations --

THE COURT: So you're not arguing -- well, maybe it's the City, I'm not sure or the department. But you are not arguing for a statute of limitations or dismissal based on statute of limitations except on Count Three?

MR. DAHL: We have not so moved, Your Honor.

THE COURT: Okay.

MR. DAHL: We didn't move on Count One or Count Two. Those are malicious prosecution based counts. And as this Court is likely aware, this summer in McDonough v. Smith, United States Supreme Court held that a fabrication-based claim sounding essentially in malicious prosecution accrues at the date of the nol pros.

THE COURT: Okay.

MR. DAHL: We had expected that to be the case. We highlighted that the case was on cert. It didn't come down our way. Such is life.

THE COURT: Okay.

MR. DAHL: But no. We are --

THE COURT: Well, Count Three is a false arrest effectively argument.

MR. DAHL: It is.

THE COURT: So you are trying to date that from the date of the arrest.

MR. DAHL: We are trying to date that from the date that the arrest became subject to legal process, which under Wallace v. Kato, which is the date of the arraignment. But even stretching it out, if we were to apply the more liberal rule, supply the false arrest claims under Maryland law for whatever reason --

THE COURT: Um-hum.

MR. DAHL: -- that would stretch out to the date of the release which is March 23, 2015. So says the court's docket and that date is also recited in the plaintiff's LGTCA notice which is attached as Exhibit C to our motion to dismiss.

THE COURT: Okay.

MR. DAHL: So it's the matter of two different seizures. There's the seizure that occurred at the scene. That's the false arrest claim.

THE COURT: Count Three.

MR. DAHL: Count Three. And that may not even be frankly subject to the Heck bar. The Wallace v. Kato case says if it's subject to the Heck bar, if a challenge on that, incarceration would attack the validity of the eventual conviction. It's conditional. It's entirely possible he could have brought that claim before his conviction. It's entirely possible he could have brought his claim after his conviction. He can't bring it now. It became time barred on March 23rd, 2018. It is too late. And that's a very short -- it's a claim that relates to a very short --

THE COURT: So I understand that. But are you arguing for a statute of limitations on any other counts such as Counts Four and Nine or no longer are you pursuing those?

MR. DAHL: Count Four. Yes. I'm sorry. We have argued for Count Four. Count Nine is a state law claim which would not be a Heck bar situation. We argued on Count Four because there is no case law in this state and the plaintiff has cited no case law in any other jurisdiction stating that a failure to intervene claim gets the same rule of deferred accrual as a malicious prosecution claim.

We have cited reported authority from the Northern District of New York. In response, the plaintiff has cited no case. We think that the Northern District of New York is right on the issue. The statute of limitations are always a balancing test. That's elucidated in or the application arises from a balancing test as a matter of public policy. That is elucidated in the Wallace v. Kato case. That there are interests in getting -- having claims brought promptly. And someone who is accused of failure to intervene for having been at the scene is differently positioned, particularly on a 30-year-old claim, from someone who is intimately involved or alleged to have been intimately involved in the actual investigation and malicious prosecution.

THE COURT: So isn't a failure to intervene comparable to accomplice liability?

MR. DAHL: It is a matter of bystander liability

and I would not -- I would be loathed to borrow from the criminal law on the accrual of statute of limitations. The --

THE COURT: And why should it be a different rule?

MR. DAHL: It should be a different rule --

THE COURT: Other than just the general principle you want to get these things over with. But again if you are accepting a malicious prosecution goes out to a certain date, why wouldn't it be the same rule?

MR. DAHL: It wouldn't be the same rule for the same policy reasons that say that unlawful detention under a Wallace v. Kato claim doesn't go out to the --

THE COURT: If I'm not mistaken, the failure to intervene is not necessarily about the arrest. It's about this whole episode. Correct?

MR. DAHL: It's not incredibly clearly pleaded what it's about.

THE COURT: Fair point.

MR. DAHL: So we are granting the plaintiff every possible interpretation.

THE COURT: Isn't that what I'm supposed to do on a motion to dismiss?

MR. DAHL: And that's what we're doing in response in so moving to dismiss.

THE COURT: Okay. Okay. Now just to make sure there's enough time for the -- for Baltimore City, I'm trying to see what other issues we have.

There are -- on your LGTC -- are you -- let me just make sure about this. Who is arguing the LGTCA? Is that you?

MR. DAHL: That is me.

THE COURT: Okay. So I guess I'm trying to understand the argument here. Is it that they moved too early or they gave notice too early in some fashion or is it that the notice was insufficient in some way or both?

MR. DAHL: Well, it's either depending on which count it relates to. Our argument is that it came too early as to one of the counts. That being the count for state law and malicious prosecution. State law and malicious prosecution had not yet accrued at the time that the notice was sent because it doesn't accrue until the date of the nol pros, until the date of the dismissal. This predated it. It was never renewed.

But as to both malicious prosecution and all of the other state law counts, there's no allegation, no reasonably specific allegation that could reasonably contemplate time, place and cause under CJP 5-304 against any of the officers to whom I represent. The only officer who is named in the LGTCA notice is Joseph Mueller and all

that's said about Joseph Mueller is that he gave false testimony. Well, false testimony is not the subject of a 1983 claim. He's immune for that. Briscoe v. LaHue. So a municipality receiving this document would look at that and so conclude.

And the municipality would also look and see that there were some allegations about documents being withheld, information being withheld. It doesn't say by whom. It just says -- makes reference to a petition for writ of actual innocence. So I mean is the municipality looking at that? And I can't speak for what the municipality actually did. I don't represent them. But would have walked down Fayette Street, taken a right up Calvert Street, gone to the courthouse, pulled a petition and read a very compelling story about how a crooked prosecutor withheld a document and reasonably concluded that the officers had done nothing wrong.

The municipality was not on notice of these claims. The officers were not on notice of these claims until they were sued and it's too late and that applies to all of the state law claims.

THE COURT: Okay. So I think we have approximately six minutes left for the City. Should we go to them?

MR. DAHL: I will yield and rest on my papers as

to the balance of the arguments, Your Honor.

THE COURT: Thank you. So, Ms. Lynch, one thing I wanted to ask at the outset is are you or are you not pursuing this Eleventh Amendment theory? You didn't raise it in your opening brief. I think that to some degree is grounds even to just reject the argument outright. But it was responded to in the surreply. So I think I have at least heard from both sides on that issue. Are you pursuing that or not?

MS. LYNCH: We certainly are pursuing that, Your Honor. Eleventh Amendment immunity is jurisdictional. It is subject matter jurisdiction --

THE COURT: Under what case?

MS. LYNCH: Under Cunningham versus General Dynamics, 888 F.3d 640 and that's a 2018 Fourth Circuit case wherein the Fourth Circuit stated that sovereign immunity is a jurisdictional bar to suit.

THE COURT: Sovereign immunity or Eleventh Amendment immunity?

MS. LYNCH: Eleventh Amendment immunity. But they use the term sovereign immunity.

THE COURT: Was it an Eleventh Amendment case?

MS. LYNCH: Yes. I believe so.

THE COURT: Okay.

MS. LYNCH: It was actually --

THE COURT: What was it again?

MS. LYNCH: 888 F.3d 640.

THE COURT: So I guess what I'm wondering is I know you've cited one of the cases from Judge Hollander from this year. But that appears to be in my view an outlier, particularly since it did not go through the type of analysis that the Fourth Circuit has asked for. It basically assumed because a case -- an entity is a state agency for purposes of state sovereign immunity that it is for the Eleventh Amendment and that's not been the test historically. So what am I missing?

MS. LYNCH: I don't think outlier is necessarily a fair characterization. Judge Hollander issued two decisions both in March of 2019 stating that BPD is a state agency since 1867 and is, therefore, not subject to Monell liability --

THE COURT: That's one of the four-part tests that it -- the State views it as a state agency and I don't think anybody disputes that that's true. But what about the other elements of the test?

MS. LYNCH: As to the other elements of the test, admittedly there was a practice in the federal district courts based on Chief Judge Kaufman's opinions in the 1980's that the City and/or the BPD could be sued under 1983 because the BPD and the City were viewed as

being two connected.

Since the time of those decisions, there has been a shift in the law and I don't mean exclusively the Hollander cases, although there was another Judge Russell case, Garner v. Hope, which is cited in our pleadings and there was another reported decision from I believe Judge Williams of this court which was Dixon versus Baltimore Police Department and that's 345 F.Supp. 2D 512.

But since Judge Kaufman's decisions, the law changed in that in 2002, the Supreme Court in Federal Maritime versus South Carolina State Ports Authority, that's 535 U.S. 743 said that the central purpose of sovereign immunity of Eleventh Amendment immunity is not to protect the state's purse, but is to protect the dignity of the sovereign.

Reading the Supreme Court precedent, the Fourth Circuit in 2012 and then again in 2015 in the Oberg line of cases found that given the Supreme Court's statement, the impact on the state treasury is no longer dispositive, not only is it no longer dispositive, but it must be given equal weight with the other factors.

And as to those other factors, Your Honor, the court in Strohman v. Anderson, which is cited in our papers, found that this perceived connection between the City and the BPD did not exist and in fact Judge Russell

said that there's mountains of law, decades of facts and statutes which show that that connection simply is not there. As to the --

THE COURT: But the State is actually running and operating this police department? It's one thing to say that they are -- have independence from the City, but it's another thing to say that they are basically being operated by the State.

MS. LYNCH: Absolutely, they are, Your Honor. The public local laws actually are laws passed by the general assembly. They are passed by the State. The State under those laws vested the commissioner with powers just as the State would with any other state agency had. It's indisputable that the commissioner is ahead of the state agency. The police department was --

THE COURT: Can I just ask generally? I mean you're saying the law changed in 2002 because of a Supreme Court case which sounds somewhat unconnected to me. If the law changed 17 years ago, why was this argument not even in your opening brief?

MS. LYNCH: Your Honor, we have --

THE COURT: This department, it's not as if it never gets sued.

MS. LYNCH: We would have never fully abandoned this argument. It has always been --

THE COURT: But what triggered it? Just tell me. Is it the Hollander case? What made you bring this up -- dredge this up when, you know, in 17 years you didn't -- maybe you did assert it. I don't know, but you certainly didn't get any ruling saying, you know, from a controlling authority that you have immunity here.

And again I find some of these other cases such as the Hollander case as completely not -- basically relying on the conclusion that because it's a state agency, that Eleventh Amendment immunity applies, which I just don't agree with. So again why bring this up now?

MS. LYNCH: Well, to be candid, the Hollander cases did lead us to reexamine this issue. But it has --

THE COURT: So why should it be decided now when you basically didn't raise it in your opening brief? I'm not sure why -- again I don't agree that this is jurisdictional, although I'll look at your case again. But generally Eleventh Amendment is not the same thing. And so why should we even entertain this eleventh-hour argument?

MS. LYNCH: Well, if it's Eleventh Amendment immunity, I do believe that it is jurisdictional. It's subject matter jurisdiction and it can be raised at any time.

THE COURT: Let me look at this case now. What

is it again? 888 F.3rd --

MS. LYNCH: 888 F.3rd 640.

THE COURT: What page are you looking at?

MS. LYNCH: The pin cite I believe is 649 and --

THE COURT: I'm still trying to understand how this is Eleventh Amendment and not some other form of sovereign immunity. Help me out.

MS. LYNCH: Well --

THE COURT: This is under the Telephone Consumer Protection Act. It's a federal sovereign immunity argument I believe. It doesn't seem to have anything to do with the Eleventh Amendment. But I'm just looking at it now for the first time. So point me to the part where this is about the Eleventh Amendment.

MS. LYNCH: I think the analysis is analogous I guess for sovereign immunity purposes. It has a coincidence of scope. And candidly, I don't have that case in front of me, Your Honor. But what I do have in front of me is a --

THE COURT: This is your whole argument is subject matter jurisdiction. I can decide it at any time. I must decide it at any time. And you don't even have the case in front of you.

MS. LYNCH: I apologize.

THE COURT: Where it seems to me like it's being

mis-cited.

MS. LYNCH: Well, I do have another case in front of me, which is Van Story versus Washington County Health Department and that was just decided on July 25, 2019 and I only have the --

THE COURT: Okay. Give me that cite.

MS. LYNCH: I have the Westlaw citation for this.

THE COURT: So it's an unpublished case or it's a brand new case?

MS. LYNCH: I think it is -- it's a brand new case. There's nothing on here that indicates that it has been selected for publication or that it has not been selected.

THE COURT: Okay. Give me the citation then.

MS. LYNCH: It's 2019 WL-3340656. And if I could direct the Court's attention to page 3 of that opinion? Directly above the Subpart 2 that says Rule 12(b)(6), there is a paragraph which explains the -- this is an Eleventh Amendment immunity case and there's a paragraph that explains the Fourth Circuit's reiteration that defense of sovereign immunity is a jurisdictional bar.

THE COURT: I'm still not seeing where it references the Eleventh Amendment.

MS. LYNCH: In the Van Story case?

THE COURT: Yes.

MS. LYNCH: The Van Story case is an Eleventh Amendment immunity case. Let me see if I can -- on page 7 of the opinion under subsection, Sovereign Immunity and then the second paragraph, the court begins the Eleventh Amendment analysis. Under the Eleventh Amendment states generally enjoy immunity from suits brought in federal court by their own citizens and continues from there.

Certainly, Your Honor, if the Court would find post-argument briefing helpful, that's something that we would be more than willing to provide.

THE COURT: So anyways, your best case on all of this is Van Story on the subject matter jurisdiction question. But then on the merits of your argument about the Eleventh Amendment is what?

MS. LYNCH: Our argument about the Eleventh Amendment is -- excuse me -- well, as far as the four factors that the Court is required to consider, the state treasury being one of them, but not being the predominant factor, whether the agency exercises autonomy, whether there are state or local concerns and the classification pursuant to state law, I think that the classification pursuant to state law is, you know, sort of a slam dunk for us. I don't think that's contested.

We do admit that at this point in time that judgments are paid from the City. So that admittedly is not all the way in our favor at this time. As to the --

THE COURT: Or at all in your favor?

MS. LYNCH: It's not in our favor at this time, Your Honor.

As to the second and third arguments, the state versus local concerns, in the Owens case, which the Fourth Circuit decided in 2014, which is cited in the briefs, the court there didn't pass upon it, but it did recognize that the district court found that the State's Attorney, the Office of the State's Attorney had Eleventh Amendment immunity and they are a similar agency to the Baltimore Police Department in prosecuting laws that occur in the state -- I'm sorry -- prosecuting state laws in Baltimore City. The public local laws again are enacted by the general assembly and install the commissioner as the head. He has the authority to --

THE COURT: I guess I'm not quite sure I'm understanding that argument. Doesn't every police department in the state enforce state laws?

MS. LYNCH: Yes.

THE COURT: Prince George's County which is where we are sitting right now --

MS. LYNCH: The.

THE COURT: Unfortunately, for whatever reason, the U.S. Attorney here brings a lot of cases started by the Prince George's County Police Department. So we're very familiar with them. And I'm pretty confident that most of the laws they are enforcing are state laws.

So again I don't -- but they are clearly subject to Monell. So I guess I'm trying to understand why the fact that they are enforcing state laws makes their matters a statewide purview for the department --

MS. LYNCH: Well, it's just a factor of the analysis, Your Honor. There is also the fact that Baltimore is a large city where people come to work who are not Baltimore citizens. They use Baltimore City services. We have Oriole Park, concerts and events at First Mariner Arena that draw --

THE COURT: Why don't we move on to a different issue? So I think I can figure out the Eleventh Amendment issue from what I've heard.

What about the Monell argument? Tell me what your position is there.

MS. LYNCH: The plaintiff's Monell claim fails as a matter of law and I want to emphasize at the outset because I think with all the complexities and minutia of the case law, it's obvious but it can be sometimes easy to lose sight of the fact that in order to properly plead a

Monell claim, there must be facts in the complaint that make it plausible, not just possible, but plausible that the municipality through deliberate indifference caused the constitutional violation. And in order to do that, plaintiffs have put forth several theories, one of which is the failure to train theory.

And the Supreme Court in Connick v. Thompson said that when a complaint rests on a failure to train theory, a policy of inadequate training, it is at its most tenuous. In order to show this, the plaintiff must allege facts that make it plausible and identify the nature of the training, which they have not done. The policymakers which they have not identified had notice that the omission caused the constitutional violation and made a choice to retain that program in light of that knowledge and that's also the Connick case at pages 61 and 62. And then of course, they have to put forth facts that if proven would show that the training deficit caused the constitutional violation.

And with respect to the nature of the training, I'd refer the Court to page 12 of our motion and page 6 of our reply in the McDougal and McDowell cases which were decided fairly recently by Judge Hollander and Judge Russell respectively and those cases cite other cases such as Hall versus Fabrizio and the Peters case.

In those cases, the plaintiff claimed that there was insufficient training in the areas of arrest without or probable cause to arrest and improper searches. And the court held that that was bare bones absent any factual material -- factual allegations about the type of training that the officers actually received. It's not enough. In Canton v. Harris, the Supreme Court said that a general laxness of training or an allegation, you know, that more, better, different training could have prevented the constitutional violation is simply not enough.

With respect to the second element that must be supported in the pleadings, the policymakers had notice that the omission caused the violation of constitutional rights. That's missing as well. First, there's no factual material in the complaint to identify the policymaker who actually was responsible for the training program at issue.

There are five incidents that are in the complaint which I'm sure the plaintiffs will mention. All of those incidents postdate the constitutional violation in this case. There's nothing in the complaint that shows that in 1999, there would have been notice of a constitutional violation that -- I'm sorry -- that some deficit with the training was causing a constitutional violation, let alone that in light of that knowledge, the

policymaker was deliberately indifferent to the fact that this lack of training was violating people's constitutional rights and just chose not to change it.

If anything, the Tabeling Report, which also postdates which is referenced shows that --

THE COURT: What time period does that report cover though?

MS. LYNCH: The Tabeling Report? It does cover prior to 2000. But the report was not issued until 2000. So it would not have been able to put the policymaker on notice of anything.

With respect also to -- they identify -- the type of training is just some sort of nebulous failure to adequately train on Brady and failure to take training on proper investigatory steps. And with respect to that, there has to be a connection as to how that training would have caused an officer to do things like destroy or bury guns, to coerce witnesses into making up a false narrative and then burying a document that didn't agree with the false narrative because those are the constitutional violations at issue in this case.

And if the Court looks to Connick, again in that case, the court -- the Supreme Court held that the State's Attorney's Office couldn't have been on notice that there was a failure to train on Brady because the cases that the

plaintiff relied on in the complaint, which were cases that were years prior, not years subsequent as we have in this case. But they were a different type of Brady violation. So the court found that wasn't enough.

As to the condemnation theory of liability and a lot of the arguments here overlap with the arguments for failure to train as far as deliberate indifference goes and how that has not been shown. For condemnation, a plaintiff must show the policymakers knew, in this case in 1999, that there was a practice so widespread and persistent, so firmly entrenched and established that it had the force of law, the force of law. And that is simply missing from this complaint. Again all of the --

THE COURT: So that's the condemnation theory. What about just the widespread practice? Is the standard the same or different in terms of what the leadership needed to know at that point in time?

MS. LYNCH: Yes. My understanding is that -- when I say condemnation, what I mean is the widespread practice.

THE COURT: I see. Okay.

MS. LYNCH: The widespread practice of which there had to be notice, actual or constructive notice and for which there had to be a failure to correct it, not as a matter of negligence, not as a matter of gross

negligence, but as a matter of deliberate indifference. And there has to be something in the complaint that shows that, that that's plausible, not just possible, but plausible. And perhaps that's a high hurdle. It is a high hurdle. The court has called it a high hurdle.

With respect to another theory, which is a little bit ambiguous from the pleadings --

THE COURT: Can I ask since we're short on time here, I wanted to get this question in because it seemed like Mr. Dahl was acknowledging at this point that the malicious prosecution claims are not time barred. I believe my notes show that the City was also making that argument. Are you in agreement with Mr. Dahl or do you have a different position on that?

MS. LYNCH: Your Honor, since the Supreme Court decided McDonough v. Smith, we would agree with Mr. Dahl that we are no longer presenting that argument. However, we do join in Mr. Dahl's motion with respect to the statute of limitation argument as to the remainder of the counts.

THE COURT: Right. Three, Four and Nine I think.

MS. LYNCH: Yes. Oh, in particular, Count Three, which is the federal claim because the state law claims and I don't believe this is contested aside from

indemnification, BPD has sovereign immunity for state law claims under Cherkes v. Baltimore Police Department.

THE COURT: Okay.

MS. LYNCH: And I think that's not contested and that's well established.

THE COURT: You had one more issue you wanted to raise and then I'd like to go to the plaintiffs.

MS. LYNCH: With respect to indemnification, that's a state law claim that the plaintiffs I think believe that sovereign immunity does not apply to it, this claim fails as a matter of law because the case law is unequivocal that plaintiff doesn't have standing to bring it at this time because the BPD does have sovereign immunity.

The Court of Special Appeals was clear in Johnson v. Francis. That's cited in our brief, but it's 239 Maryland App. 530 in 2018. That a plaintiff may not pursue a municipality unless and until judgment is entered against the employee and it is established that the employee was acting within the scope of employment. And that's the case because of the Local Government Tort Claims Act which waives Baltimore Police Department's immunity only to the limited extent of the duties the defendant indemnifies. So until those preconditions are met, that claim is premature. BPD has sovereign immunity

and it must be dismissed.

THE COURT: So you're asking us to sort of dismiss it, but then potentially if those items are shown, have us amend the complaint and later on, de-burden to the case. Is that what you are asking for?

MS. LYNCH: No. Not necessarily, Your Honor. In the Johnson v. Francis complaint, for example, the plaintiffs later brought an enforcement action. So there are other mechanisms through which the plaintiff can do that rather than bringing it in their case in chief, which they are not able to do because the Baltimore Police Department has sovereign immunity and the pre-conditions of the Local Government Tort Claims Act must be met. The Local Government Tort Claims Act does not authorize a direct suit against a governmental entity.

THE COURT: Okay. Why don't we hear then from Ms. Horn?

MS. HORN: Thank you, Your Honor.

This case involves a 16-year old who was the victim of a robbery who was later arrested and prosecuted for a murder when all along, the defendants knew that the real killer had confessed. That information was withheld from him throughout his criminal proceedings. And as a result, he was wrongfully convicted of a crime that he did not commit and spent many years in prison for that crime.

I know we have limited time. So I do want to jump to some of the arguments that the defendants have made to try to dismiss this case in its entirety and since the individual defendants started with judicial estoppel, I'll start there as well.

As this Court is aware, in order for a judicial estoppel to apply, all three of the elements of judicial estoppel have to be met. It's a conjunctive test and that's because judicial estoppel was meant to be applied sparingly. It was meant to be the exception rather than the rule. And I want to start with the elements --

THE COURT: How do you interpret the -- how things were handled on the petition -- at the petition phase? Mr. Dahl raises the point that the focus was on the prosecutor and one can infer from that that now that it's taking a contrary position now that the -- there is basically intentional misleading of the Court.

So other than saying that they've changed courses, you are -- I don't know if you were involved before, but that the plaintiff has changed course along the way for its own advantage, how else could I look at that record if at all?

MS. HORN: Yes, Your Honor. I think that -- certainly, there was -- and we're not going to dispute the writ of actual innocence says what it says. The

statements in it say what they say. But I think the thing that's really important to keep in mind when you're looking at this is that for purposes of the criminal case, it didn't matter whether the prosecutor withheld the document or whether the police withheld the document. All --

THE COURT: I'm not sure Mr. Dahl agreed with that. So why don't you tell me how -- if this had been the officer, how the argument would have gone and why the plaintiff would have prevailed anyways?

MS. HORN: Because, Your Honor, the Brady violation is a violation that's committed by the State and Kyles versus Whitley says that information in the hands of a law enforcement officer is imputed to the prosecutor. They are one in the same for purposes of Brady.

It's only when you get into the civil litigation universe and I think even Mr. Dahl acknowledged that, that the spheres of liability matter. It matters in the civil context whether it was the police that withheld the document -- and information in the document or whether it was the prosecutor.

But in the post-conviction universe where Mr. Parks had to prove that the document was newly discovered, that it couldn't have been discovered sooner without due diligence, all that mattered was that it was

withheld by the State and the State is -- under Kyles and under well-established case law, the State is the police and the prosecutor.

THE COURT: But why focus so heavily on the prosecutor? Why not make some sort of broader argument or argument in the alternative if your side honestly believes that this could have just been the officers and not just the prosecutor?

MS. HORN: Your Honor, there were statements in the petition or, sorry, the writ. I keep calling it a petition. I apologize. The writ that discussed the State having withheld evidence and the State having not produced documents or produce the Mueller report.

What Banks versus Dretke, a Supreme Court case says is that Brady is a matter of prosecutorial misconduct. And in that case, you describe the Brady as a matter of the prosecutor withholding the document because even though the courts have imputed information in the hands of the police officer to the prosecutor for purposes of Brady, it's ultimately the prosecutor that has to turn it over. I mean Banks calls Brady Brady prosecutorial misconduct. Even though in the Banks case, the person who withheld the document was in fact a police officer.

THE COURT: So what part of your complaint lays out the facts or tell me the theory under which this

really was the officers which would be somewhat different than what was offered on the writ? What are the factual allegations you can make now and where do those allegations come from that gives you the ability to make a different argument now?

MS. HORN: Your Honor, I believe the factual allegations are that as it's described starting at "police suppress Burgess' statement and other evidence" around paragraph 32, that Officer Mueller goes and speaks with Burgess, he takes his statement and that statement isn't disclosed. It's not in the prosecutor file which is pled later on.

So if you look at paragraphs 53 and 54, Mr. Parks got the prosecutor file. The Mueller report was not in it and during the writ of actual innocence also made an MPIA request for the prosecutor's file and it wasn't in it then either.

So, Your Honor, I think the allegations are that the document that we're describing, that we're talking about is not in the prosecutor's file. There's no reason to suggest that the prosecutor had it.

THE COURT: What about the notation on the document?

MS. HORN: Well, Your Honor, Mr. Dahl suggested that this Court could take judicial notice of that note

and certainly, this Court can take judicial notice that the document exists and that the note is on the document and the writing is there.

But to try to take judicial notice of what that actually means, I think is improper at this pleading stage and that is really what Mr. Dahl is asking you to do in this judicial estoppel argument and in other arguments. He's asking this Court to say when it says per Ms. Costley, don't turn over this report -- I'm paraphrasing -- that this Court should interpret that to mean that that is exactly what happened. And that's not proper at this stage because that is a disputed issue.

THE COURT: But isn't that what your predecessor counsel argued on the writ, that the prosecutor had made that determination?

MR. DAHL: Well, Your Honor, I think what the prosecutor argued or, sorry, what our predecessor counsel argued at the writ stage was that the prosecutor didn't turn it over. And I know I sound like a broken record. I mean certainly, there is a statement in the writ of actual innocence that the report states X, Y and Z from -- it said per Ms. Costley. The document speaks for itself. It states that. Nobody is disputing that basic fact.

But again for purposes of the writ, the prosecutor is the one who is supposed to turn over

material. That is the prosecutor's job. And information that may only be in the hands of the police department is still imputed to the prosecutor under a long line of Brady case law starting with Kyles. And so I don't think that that issue is dispositive in this case.

And I would also like to if this Court will indulge me, one of the other factors that's required for judicial estoppel to apply is that the court relied on and actually adopted this version of events. That the court made some kind of finding that it was the prosecutor as opposed to the police officer that had this document. And there really is no evidence whatsoever of that.

In their reply, the defendants cited to the order suggesting that the order somehow gave this argument credence. But what the order actually says is "upon consideration of the writ -- of the petition for writ of actual innocence and there being no opposition by the State and for the reasons set forth at the hearing" --

THE COURT: What page are you on?

MS. HORN: I'm actually on Document 63-1, which I believe is Exhibit A to the individual defendants' reply.

THE COURT: Okay. Go ahead.

MS. HORN: What the order actually says is that the reasons why the court was granting the writ were the

reasons set forth at the hearing in the above-captioned case on March 3, 2015. And if you go to the hearing document which was attached to our response, all that's said at the hearing is the State represents that it's conducted a thorough investigation, that Officer Mueller has authenticated the handwriting on his own report and that the State believes that --

THE COURT: What page are you on for this?

MS. HORN: Sure, Your Honor. It is -- I believe it is Exhibit A to Plaintiff's --

THE COURT: 58-1?

MS. HORN: 58-1. Yes, Your Honor.

THE COURT: And where are you referring to?

MS. HORN: I'm looking at page 4 specifically. Pages 3 and 4 I suppose where Mr. Gioia is speaking.

THE COURT: Which part?

MS. HORN: Sure. Your Honor, what Mr. Gioia says --

THE COURT: And who is Mr. Gioia again?

MS. HORN: He's the State's Attorney.

THE COURT: Okay.

MS. HORN: What he says is that the -- and this is on page 3 -- he says "the State has carefully gone over the material" at line 17 and 18. At line 19, he says "the State has conducted an extremely thorough investigation in

this case, including interviewing witnesses, most importantly, a Baltimore police officer who offered a report that was attached as an exhibit to the petition" and then he goes on to say that "the officer is present in court, he has authenticated that document partially, he has authenticated his handwriting and his signature." And then in the next paragraph that follows at lines 2 through 12 --

THE COURT: Who is he referring to? He's referring to --

MS. HORN: Officer Mueller, Your Honor.

THE COURT: Okay.

MS. HORN: He says that had -- I'm starting at line 5. "Frankly, had the jury had, had Mr. -- the nonfatal shooting Mr. Burgess been impeached with a police report or by the testimony of a police officer in this case, I think it would have created a significant or substantial possibility of a different result as it would have cast -- it would have supported the self-defense that was raised by Mr. Burgess in this case -- I'm sorry -- Mr. Parks, excuse me, and then he says for that reason, we're agreeing." And the court literally just says "okay, all right, well, thank you very much, Mr. Gioia; I assume there is no opposition to that, Ms. Sansone; is that right?" And she says no.

So the reason why Mr. Parks' writ of actual innocence was granted is not because the court adopted wholesale the arguments in Mr. Parks' writ of actual innocence nor is there any indication whatsoever that the court ever made a determination about who was at fault for not turning over the Mueller report. What the court does is agree with the State's assessment that had the report been turned over, there's a substantial possibility of a different trial.

THE COURT: So the State didn't really contest the ultimate result. Correct?

MS. HORN: The State -- that is correct, Your Honor.

THE COURT: So it didn't insist on a factual finding on exactly how we got there? Is that your argument?

MS. HORN: That is correct, Your Honor. There was no factual finding made by any party, not by the State or by the court or even by Mr. Parks himself.

And so ultimately, regardless of whether there was inconsistencies in the factual statements, the defendants can't meet the prong of judicial estoppel that requires the court to have relied on or adopted this alleged inconsistent factual position and so estoppel is out the door.

THE COURT: Let me ask you about your conspiracy counts.

MS. HORN: Sure.

THE COURT: And the defendants say everyone in this is part of the department with the possible exception of the prosecutor and you don't really give any specific facts in the complaint that explain how this prosecutor was involved in this alleged conspiracy. So what detail is there to meet the low, but still significant bar to get you past this motion?

MS. HORN: Sure, Your Honor. I think that the argument essentially -- but the argument that was raised by the defendants in their brief was that because of judicial estoppel, we could not -- well, there's an intracorporate conspiracy doctrine that precludes plaintiff from proceeding just against BPD. We don't dispute that. We agree with that.

What we're saying is if you accept the defendant's argument that this Court should take judicial notice of this document that's referenced in plaintiff's complaint and attached to the defendant's motion to dismiss and make a factual determination about the meaning of that note on the document, then there still is a viable conspiracy claim because what the allegations are in the conspiracy count is that there is a conspiracy between BPD

and another --

THE COURT: I guess I'm saying -- you're asking me basically to adopt something from the defendant's brief as being part of the complaint. I guess I'm trying to ask where in the complaint does it say that you have some factual allegations to show that it was the prosecutor and these officers who were colluding or conspiring. You are just saying, well, they've sort of acknowledged this in their complaint, although even then, it's not clear they are acknowledging a conspiracy. At most, they are acknowledging facts to support a individual violation by the prosecutor who is not the defendant. So they're not even acknowledging that there was some sort of group effort here.

MS. HORN: I understand, Your Honor. And in candor, there aren't specific facts in the complaint that lay out this alternate conspiracy theory where the prosecutor tells them don't turn this over and they all conspire to do that.

I suppose the argument was made in the alternative. To the extent that the Court is going to adopt the defendant's version of this case, then there can be still be a viable claim --

THE COURT: But their version is that to use the old adage with conspiracies, that the prosecutor was

acting alone, isn't it?

MS. HORN: Well, I'm not sure of that, Your Honor. I mean certainly --

THE COURT: Well, they're not acknowledging that their clients were doing anything wrong I don't think.

MS. HORN: Certainly they're not acknowledging that their clients were doing anything wrong. But their argument was essentially we turned the document over to the prosecutor so we've washed our hands.

And all that I was trying to say and to the extent that this court would permit us to leave to replead facts to support this claim, is that even if under these circumstances, the police officers disclosed this document to the prosecutor and the prosecutor said to them, don't turn that over, there still can be a conspiracy claim because they knew -- they weren't turning it over to a competent authority. They knew they were violating defendant's rights. They knew she said don't turn it over, don't give it to me, don't give it to the defendant.

THE COURT: So are these additional facts you have at your disposal now or do you really need discovery to develop those kinds of facts?

MS. HORN: I think we need further discovery to develop those kinds of facts. But I do think we could replead. To the extent that this Court is going to give

credence to this note on the document and have it mean what the defendants say it means, I think that there is still a universe in which a conspiracy count can exist because you can't discharge your obligation by turning a document over to somebody who says, hey, hey, that may be a smoking gun, but don't disclose it.

THE COURT: Okay. Why don't we go briefly to the Eleventh Amendment argument that I spent some time with with Ms. Lynch about.

MS. HORN: Sure. I do want to preface that I haven't had an opportunity to read the case law that she cited. This is all new -- these are new arguments to us and we would and we have argued waiver. So I just want to preface that I can't speak to those specific claims that she made regarding the jurisdictional -- the specific cases she talked about.

What I can say is this. That the cases that they cite for the proposition that the Baltimore Police Department should have sovereign immunity don't actually conduct any analysis of the four-factor test. And regardless of whether there's a Supreme Court case that suggests that there is, you know, now less of a primacy placed on the treasury or the deep pockets, there still are these four factors that the Court has to analyze and I didn't hear her suggest that there had been some

jettisoning of that particular test.

And I think if you look at that test and we cited a case, Alderman, the test really points towards BPD's not having Eleventh Amendment immunity for purposes of a Monell claim. As they've conceded, the City pays the judgments.

The second factor, the autonomy from the State, there is -- although the -- I think that there is some confusion. I mean there is a connection between the City and the Baltimore Police Department and that certainly suggests that the City is separate from the State.

But there is also no evidence that I've seen or no pleading, no allegations that the State somehow controls the Baltimore Police Department other than setting it up as an agency. And we sort of describe some of the ways in which the City and the Baltimore Police Department are linked. The City appoints and removes the police commissioner. They collaborate on the budget. They authorize a number of Baltimore Police departments they can hire, set employee salaries, the commissioner apprises the Mayor and the City Council of information. So I think that that factor, the autonomy from the State cuts in the direction of finding that BPD does not have Eleventh Amendment immunity.

The third factor, whether it has a local versus

state concerns, I agree with the Court that simply saying that they enforce state laws doesn't cut it. Their jurisdiction is local. Their jurisdiction is the City of Baltimore. They serve the citizens of the City of Baltimore. I think that the Alderman case actually discussed this argument that because they are enforcing criminal law, they somehow have, you know, serve the State and rejected it. And for good reason as this Court has recognized that all police departments are enforcing laws that were created by the State.

The last factor of how it's classified under the state law, certainly we aren't disputing that BPD has been created as this anomaly as a state agency. But we would submit that there are instances where it is not treated completely as a state agency and I think the Local Government Tort Claims Act is one of them. You know, they are considered a local government for purposes of that act including for indemnification as counsel discussed earlier.

So, you know, from our perspective, this is actually a fairly straightforward application of the four-part test leads to the conclusion that BPD should not have Eleventh Amendment immunity. And relying on these cases that simply say because it's a state agency that has immunity doesn't cut it because it doesn't actually

analyze the factors.

The other argument -- I don't know if you have any specific questions --

THE COURT: Well, not really. You had raised the LGTCA. So I wanted to ask you about that. If there is something else you want to add on immunity though?

MS. HORN: No, Your Honor.

THE COURT: Okay. So then there is the question of timing here and does it make a difference whether you file your notice before the action accrues? Obviously, you've argued when the action accrues for purposes of other claims. You are really kind of stuck with that time. Why isn't that a problem? This statute does -- is very prescriptive about timing requirements, isn't it?

MS. HORN: Your Honor, certainly, we aren't disputing the time that when a claim accrues, specifically, when the malicious prosecution claim accrued.

Our argument is that there was substantial compliance because the facts underlying that claim are all there in the notice. The notice identifies the case number. It identifies the crime. It identifies the fact that he -- I mean I think it goes through a number of labels, some different potential causes of action that he might have.

And the case that the defendants cited is this court's case, the Edwards case. And I think that Edwards is very different from the facts that we have here. In Edwards, the two incidents where the plaintiff had alleged that she had been denied proper accommodation actually happened well before the constructive notice, let's say, had even been given. So that the fact -- the jurisdiction couldn't even investigate those incidents because they hadn't happened yet.

The malicious prosecution claim is very different because the underlying set of facts, that investigation and the prosecution had already occurred. All that hadn't happened yet was that was the prosecutor dismissed the charges against Mr. Parks.

THE COURT: What about the failure to reference the various defendants in our case?

MS. HORN: Sure. I would also argue substantial compliance and I think that the Burgess versus this Baltimore Police Department case is instructive on this. In that instance, a number of defendants were added to the case and there was an argument that because their names weren't specifically listed, somehow that made the notice improper. And what the court found was no, there was substantial compliance because the police department could still investigate the claims.

I mean at the end of the day, what the Watson case says about substantial compliance is that the police or the municipality have the opportunity to actually investigate and that opportunity was provided in this particular case. It does say Officer Mueller and others. We recognize that. We aren't disputing that. But I think that under the case law of substantial compliance, that is sufficient.

THE COURT: Okay. What about the Monell argument then? So which theory are you pursuing here? Is it failure to train? Is it a widespread practice? What is your argument here?

MS. HORN: We are pursuing both, Your Honor. We are pursuing a failure to train on Brady obligations and we are also pursuing a widespread practice of withholding and fabricating evidence.

And what I heard counsel say was, you know, it's -- I think her words were specifically it's a high hurdle. But the Owens case actually says the opposite. What Owens says is it's not hard to plead a Monell claim. What it's hard to do is to prove it. And I think that what counsel repeatedly referenced the Connick case in her discussion of our claims. Well, Connick was a case that arose after a verdict.

Certainly, we don't dispute that through

discovery, we have to prove each of the elements of a Monell claim, including things like identifying a policymaker, proving deliberate indifference. But that's very different from what we have to do at the pleading stage. And I think that Owens really controls this case.

And if you look at Owens and you look at the allegations in Owens, we've far surpassed what Owens did. Owens said there were "reported and unreported cases" and that there had been successful motions. That was the sum total of the allegations that the Fourth Circuit found sufficient.

THE COURT: So Ms. Lynch makes a -- I don't think she said this entirely explicitly. But I infer from it that she says that to the extent you can plead that there are incidents similar to this or incidents of withholding evidence if they happen after your events, that they are not helpful on this point because -- not necessarily arguing that there is no pattern, but it hadn't been established at the time of the incidents in question in your case. So what is your response to that?

MS. HORN: Sure, Your Honor. What the allegations were is that during this timeframe, the relevant operative period, there were incidents, similar incidents of due process violations that occurred in other cases. And then we provided five examples.

Now all of the withholding or due process violations that occurred in those cases occurred in the operative time period, occurred prior to Mr. Parks' arrest, prosecution -- arrest, investigation and prosecution. What I believe counsel is getting at --

THE COURT: Which paragraphs are you referring to? She seemed to say that they were after. I don't know if that's --

MS. HORN: Well, what I believe she is referring to is that the exonerations were after and that's certainly not in dispute. The exonerations of these gentlemen who served decades in prison occurred after Mr. Parks' conviction. But I don't think that's kind of neither here nor there for these purposes. Again we're at the pleading stage. So these examples provide examples of just as Owens required of reported and unreported cases where there were due process violations.

THE COURT: So it looks like at least the way you've pleaded it that these -- the alleged withholding which presumably would have happened prior to the convictions happened in the '80s and '90s. But then the exonerations as you said occurred in the 2010's for the most part.

MS. HORN: That is correct, Your Honor.

THE COURT: Okay.

MS. HORN: And my concern is that I think that counsel is trying to graft onto these Monell cases requirements for pleading that just simply don't exist. There may be individual district court cases that have asked plaintiffs to identify the policymaker or some such thing, but that's really not what the Fourth Circuit has said. The Fourth Circuit has said in Owens, it's easy to plead these cases. The high hurdle comes when you have to prove them. I think that between the Tabeling Report and the examples that we have given, we are far past the issue of whether we have pled sufficient facts to get over the Rule 12 hump.

I would like an opportunity if this Court will indulge me to discuss the Heck issue on the Manuel claim.

THE COURT: On the which claim?

MS. HORN: On the unlawful detention claim.

THE COURT: Yes. Go ahead.

MS. HORN: Count Three, Your Honor. The McDonough case that was issued this summer by the Supreme Court talks about the fact -- and McDonough involved there was initially a mistrial and then subsequently after the mistrial, he was retried and he was acquitted and the allegation in McDonough was fabrication of evidence.

And what McDonough said when trying to decide about when the statute of limitations for a fabricated

evidence claim like the one McDonough had where he was subsequently acquitted, it doesn't begin to run until the criminal proceedings against the defendant have terminated in his favor.

And what the McDonough case basically explains is it's not just -- Heck doesn't just bar you from bringing a suit where there's a conviction. It also bars you from bringing a suit where that suit would impugn the validity of ongoing criminal proceedings. It says there's not a complete and present cause of action to bring a fabricated evidence challenge to criminal proceedings while those proceedings are ongoing.

And while we recognize that --

THE COURT: How does that spin out here? I mean I don't think that's that much of an extension of Heck if it is one. But why is this, the lawfulness of this detention --

MS. HORN: Because, Your Honor, I think --

THE COURT: -- going to affect the validity of the conviction here?

MS. HORN: Well, for two reasons. First, the same evidence was used to detain him pretrial as was used at the actual trial. So were he to bring a claim for unlawful detention during his, you know, when the detention began or even upon his release in March of 2015,

he would be Heck barred because the very proof of that unlawful detention would be the same proof that would be used to attack his criminal conviction. It was the same evidence. So he couldn't bring it until it had terminated completely in his favor. What McDonough says is you can't bring a claim that would impugn the validity of criminal proceedings.

So from March of 2015 all the way until his conviction was overturned in October or, sorry, the charges were dismissed in October of 2015, he still had criminal proceedings pending. He was still under indictment. He was still subject to a retrial. And so that period of time can't -- he can't have been required to have brought a claim for unlawful detention in that period of time because to do so would civilly attack or collaterally attack the same evidence that was being used to prosecute him.

And McDonough has some language that talks not only about the legal problems with using civil litigation to collaterally attack the criminal proceeding, but also that talks about some of the policy concerns. So the concern with avoiding parallel litigation, avoiding a collateral attack, avoiding in this case the untenable choice between letting a claim expire or filing the civil suit against a person who is involved in prosecuting him.

And so I think that the same concerns that animate McDonough require a finding that the Manuel claim did not actually accrue until the proceedings were terminated in my client's favor.

THE COURT: So you're saying the claim is that the false arrest or detention was based on the fact that at that point they knew about this other confession and therefore, had no probable cause to arrest?

MS. HORN: Your Honor, to be clear, we're not claiming false arrest. So we're simply --

THE COURT: Or detention for how long?

MS. HORN: It's a seven-month pretrial detention from the time he was held over pursuant to legal process until the time of his trial. That's the time that Manuel covers.

THE COURT: But then what's your theory on at what point in that they may have understood that they had no basis to hold him?

MS. HORN: Your Honor, I mean I believe our theory that there was no probable cause -- I mean we don't have a false arrest claim because that is time barred. But our position is there was no probable cause. They knew who the real perpetrator was and that the evidence that they generated to pin the crime on my 16-year-old client was either fabricated or was the evidence that he

needed to prove his innocence was withheld from him.

And so what we're alleging is the same evidence that was used to hold him over for trial is the same evidence that was presented at trial. And therefore, he could not have brought his claim until the proceedings completely terminated in his favor.

THE COURT: I'm still trying to understand whether this is the same or different than a standard Heck argument. Did the court rely on anything that -- I mean normally what you're looking at is, for example, a suppression issue whether there's evidence that the or there's -- you're going to challenge a search or something like that and that the underlying search was basically upheld in the criminal proceedings. So you would be contradicting effectively the court's ruling unless the conviction is vacated and so forth. So you are not making that argument.

MS. HORN: No, Your Honor.

THE COURT: Or you're just saying the evidence is the same --

MS. HORN: Well, the evidence --

THE COURT: -- and therefore -- finish it for me.

MS. HORN: No. I didn't want to interrupt you.

THE COURT: Yes.

MS. HORN: The evidence that was used -- the evidence that was generated during the investigation, the statements of the witnesses, the statements of the real perpetrator that was withheld from him, that's the same evidence that was used at trial.

For example, Mr. Burgess, the victim, testifies at trial that my client did it. That's the same evidence that was created during the criminal investigation.

And so our claim is essentially that if you required our client to bring this claim either at the time of his, you know, original detention or I think I heard counsel offer at the time that he was released from custody, his claim would be an unlawful detention without probable cause and the allegation would be they had no probable cause because they knew who the real perpetrator was and the remainder of the evidence that pointed towards my client was fabricated. That would be what he would have to prove in his Manuel claim. That's the same thing that he would have to prove to prove, for example, his due process claim which there is no dispute --

THE COURT: So do you have a case that spins out this theory -- I know that the McDonough case is new. So maybe it doesn't exist yet. But anything else you can point to?

MS. HORN: I don't have a case on point, Your

Honor. We believe that McDonough applies via analogy and the Supreme Court did decline to address the statute of limitations when it heard Manuel.

THE COURT: Okay. Well, anything else you'd like to add on any other theory?

MS. HORN: No, Your Honor.

THE COURT: Okay. So I believe the defendants had more time than the plaintiffs did. So to the extent there's any rebuttal, let's make it one or two points if any and only on things that were raised by Ms. Horn.

MR. DAHL: Just a moment, Your Honor.

THE COURT: Yes.

(Pause.)

MR. DAHL: Thank you, Your Honor. I'd like to speak first to Ms. Horn's characterization of the circuit court's acceptance of the document. Ms. Horn argued that it was irrelevant for Mr. Parks at that time to argue who had withheld the document and further challenge acceptance by the court based on the proffer made by Assistant State's Attorney Tony Gioia during his presentation to the court at the hearing.

THE COURT: So as part of that, can you tell me whether you agree or disagree with her assertion that there was no actual finding as to who -- what had actually happened with this document, whether the prosecutor had

withheld it, whether the police had done anything wrong, that it didn't get to that level of detail. Is that correct or not?

MR. DAHL: I would disagree, Your Honor. I think implicitly, strongly implicitly and necessarily --

THE COURT: Not implicitly. Like where is it in the record that the court either wrote down or said I'm finding that this was all the prosecutor's fault or something to that effect?

MR. DAHL: The court opened its order with upon consideration of the petition for writ and the court would have had to have made findings as to two elements, two elements of the petition for writ of actual innocence --

THE COURT: So the answer is no. It's not written down. It's by inference.

MR. DAHL: It was necessary because there were only facts as to the second element that related to the prosecutor withholding --

THE COURT: What was the second element again?

MR. DAHL: The second element under 8-301(a)(2) of the petition for writ of actual innocence statute is that the evidence could not have been discovered in time to move for new trial under Maryland Rule 4-331. Thus notwithstanding Mr. Gioia's, you know, alternative presentation or concession as to whether the document

could have led to a substantial or significant possibility that the result may have been different.

The only facts before the court, because the only facts that Mr. Parks put before the court was that the prosecutor withheld the document in court; that is why I could not have moved for a new trial earlier.

THE COURT: So the argument though was it was not in the prosecutor's file. Is that correct factually?

MR. DAHL: The argument factually was that it was not turned over to the defense because the prosecutor withheld it. That was the argument that Mr. Parks made before the Circuit Court for Baltimore City and it's the only one that he made before the Circuit Court for Baltimore City.

THE COURT: Okay.

MR. DAHL: And it must have been accepted by -- for the court or else the court just let someone out of prison, a convicted murderer serving 80 years because the Assistant State's Attorney said we don't have a problem with this. The Assistant State's Attorney doesn't have pardon power. It doesn't have the power to grant reprieves. The court had to look at the document and the order says I looked at the document upon consideration of the petition --

THE COURT: Okay. I understand the argument.

MR. DAHL: Okay. And then secondly, might follow the Court's instruction to leave it to two points. Ms. Horn argued that this Court alternatively might grant leave to amend on conspiracy so that she could replead that the prosecutors -- the prosecutor and the police were in it together. On that, I would simply cite Evans v. Chalmers, 703 F.3d. 636, pin cite 649, year 2012. This is another case where it was alleged based on a bad prosecutor who was disbarred for his actions in the case that the police and the prosecutor acted on it together to fabricate and conceal evidence and the Fourth Circuit said no, this is not possible. "It is contrary to the purpose of qualified immunity to extend personal liability to police officers who have assertedly conspired with, but neither misled nor unduly pressured the prosecutor." Concluding "thus, we hold today that an alleged officer or prosecutor conspiracy does not alter the rule that a prosecutor's independent decision to seek an indictment breaks the causal chain unless the officer has misled or unduly pressured the prosecutor." But because of the Fourth Circuit's recent holding on this very issue, we would say that on the conspiracy counts, Ms. Horn's request for leave to amend would be futile.

THE COURT: Okay.

MR. DAHL: And thank you --

THE COURT: Thank you.

MR. DAHL: -- for your consideration, Your Honor.

THE COURT: Ms. Lynch, anything?

MS. LYNCH: Just a few small points, Your Honor.

THE COURT: Well, Mr. Dahl was gracious enough to keep it to two. Even though I had said one or two, but he read that broadly.

MS. LYNCH: Thank you, Your Honor. Turning first to the Eleventh Amendment immunity argument, Your Honor asked a lot of questions about subject matter jurisdiction and the standard of review there. There's another case where the Fourth Circuit has been unclear on whether a dismissal of Eleventh Amendment grounds is a dismissal for failure to state a claim under 12(b)(6) or lack of subject matter jurisdiction under 12(b)(1).

THE COURT: Is this Hutto?

MS. LYNCH: This is Andrews v. Daw, which is 201 F.3d. 521 (Fourth Circuit 2000). However --

THE COURT: My understanding from Hutto, which is 2014 is that it isn't a hundred percent crystal clear, but the Fourth Circuit has said it's not a hundred percent crystal clear, but they are treating it as something that's effectively an affirmative defense and so I read that as meaning they're not finding it's subject matter

jurisdiction, even though they've had that opportunity. So it sounds like this is consistent with that. You're saying that it's saying that it's unclear.

MS. LYNCH: That it's unclear. However --

THE COURT: Which is different than what you said before which is --

MS. LYNCH: I think that the 2018 case which I've cited --

THE COURT: Which has nothing to do with sovereign immunity. Cunningham?

MS. LYNCH: Yes.

THE COURT: I mean nothing to do with the Eleventh Amendment.

MS. LYNCH: It does have to do with sovereign immunity and --

THE COURT: Nothing to do with the Eleventh Amendment though. Right?

MS. LYNCH: Well, it was not decided on the Eleventh Amendment immunity grounds, but it was sovereign immunity and --

THE COURT: The defendant was -- are you talking about Cunningham or the unpublished district court case?

MS. LYNCH: The General Dynamics versus Cunningham. However, the Fourth Circuit in --

THE COURT: Where in this does the Eleventh

Amendment even come up? Is there a state defendant in this or -- I guess I'm missing it. Again I admit that I hadn't read the case because I didn't think it was relevant. But in just in looking at it, I don't see where the State is even a party.

MS. LYNCH: Well, to the extent, Your Honor, that it would be a 12(b)(6) or a 12(b)(1) motion in Roche versus West Virginia Regional Authority --

THE COURT: Maybe we don't need to discuss this because I don't think the analysis is going to be any different whether it's subject matter jurisdiction or not.

MS. LYNCH: Okay.

THE COURT: I just have a problem with attorneys coming in and saying this is jurisdictional, here's the case and then you cite a case that doesn't even mention the Eleventh Amendment and they are very different.

MS. LYNCH: Your Honor, I --

THE COURT: And I just have a problem with that.

MS. LYNCH: Okay.

THE COURT: But again I don't think it's going to affect the decision because I think the analysis is basically the same. But, you know, the Supreme Court recently said I think in Davis in a different context that jurisdiction is not a word to be thrown around lightly in ruling on Title VII issues. And lawyers do that all the

time. They come in here and say this is subject matter jurisdiction, this is subject matter jurisdiction. And when it's not, I find that misleading. So why don't you move on to the next issue?

MS. LYNCH: Sure. In order for the Court to find that there is Eleventh Amendment immunity, the public local laws really explain that. That the general assembly established -- the commissioner is the State for purposes of this analysis. He takes the same oath that other state officials take under the Maryland constitution. The public local laws do not delegate the authority of this State to any other -- to the city or to anyone else. In fact in Public Local Law Section 16(2)(b), the Baltimore Police Department is given powers to exercise its police powers outside of the city in areas that the Baltimore Police Department owns -- I'm sorry -- that Baltimore City owns.

As far as the plaintiff said that there's some inconsistency in how the police department is classified as to state law and I think that that is just not true. There is a chance to make -- and the Court can take judicial notice of this fact -- there's a chance to make the Baltimore Police Department a city agency. There was a bill put forward and it was rejected.

The fact that the Supreme Court has called the

protection of the State's sovereign dignity as a paramount concern, I think -- although all of the factors must be given, you know, no one factor is given preeminence, I think that leads to the conclusion that the State's classification of the BPD as a state agency is highly relevant.

As to the Monell argument, Owens doesn't say that pleading Monell is easy. It says that proving it is difficult, but pleading it by definition is easier. This case is different from Owens. We're still on the complaint. It can't be that just because a cause of action was made out in Owens, it would be here. We still need to look at the pleadings filed in this case to see if they meet the Iqbal Twombly standard.

Also in Owens, that was a different type and this goes back to the Connick v. Thompson case. It was a different type of violation. It was inconsistent witness statements I believe. That isn't an issue in this case which is things like burying guns, destroying evidence, fabricating a false narrative and all that type of thing. Unless Your Honor has any other questions, I would submit on the papers.

THE COURT: Thank you.

MS. LYNCH: Thank you.

THE COURT: So we went a lot longer than I

thought we would, although that doesn't sound unusual. Let's take a brief ten-minute recess. I may be able to give you some guidance on where we stand now. We may then talk about the recent letter filed. Thank you.

(Recess.)

THE COURT: I know this motion has been pending for quite some time and that's not ideal for the life of a case. It is the reality of the competing cases that we need to focus on. But we are addressing it now. I do in part because of that, but also because I believe that all the important issues have been resolved based on the papers and the argument. I am prepared to rule on the motion to dismiss now.

First, on the issue or as a threshold issue, there were a large volume of materials attached to the motions and ordinarily on a motion to dismiss, I don't consider outside materials. There are some exceptions to that rule. And in this case, I will consider the Petition for Writ of Actual Innocence and based on judicial notice because it's another court proceeding. I will also consider the Local Government Tort Claims Act Notice which was at least largely referenced in the complaint. I find that to be integral to the complaint. Otherwise, I will not be considering other attachments submitted under Rule 12(d) which prevents me from doing that except if the

motions turn into a motion for summary judgment.

As a threshold issue because the claims of the City, Baltimore City Police Department are interspersed throughout the issues here, I want to discuss the Eleventh Amendment immunity issue. The Baltimore City Police Department asserted that as an agency of the state, it is immune to suit under Section 1983 based on the Eleventh Amendment. Although there was some discussion about this, the Court finds that under Hutto versus South Carolina Retirement Systems, 773 F.3rd. 536, (Fourth Circuit 2014), that this is not a subject matter jurisdiction issue. Sovereign immunity under that case is in the nature of an affirmative defense. So the police department has the burden of demonstrating it. And as has been said, I don't think either the Fourth Circuit or other courts have been completely explicit on this issue. But in Hutto, the Fourth Circuit does note that this is not something that they have found as subject matter jurisdiction. So I will not so find.

I will note as we've discussed, I don't think it makes any difference to the analysis. It may have made a difference on whether I should be considering it at this point, but I think in the interest of judicial economy for later purposes, I will consider it now.

And so under either subject matter jurisdiction

or under Rule 12(b)(6), I think the analysis will largely be the same.

Under Ram Ditta versus Maryland National Capital Park and Planning Commission, 822 F.2nd. 456 (Fourth Circuit 1987) whether an entity is entitled to Eleventh Amendment immunity is a question of federal, not state law. In Ram Ditta, the Fourth Circuit set out factors for this analysis. The first and most important was whether the state treasury would be responsible for paying the judgment. Under Harter versus Vernon, 101 F.3rd. 334 (Fourth Circuit 1996), that factor is generally determinative. Additional factors include whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local rather than the statewide concerns and how it is treated as a matter of state law. To the extent that the importance or significance of any of those factors may have been adjusted or arguably could be adjusted over the course of time, I will look at them all without giving primacy to any particular factor.

Based on a consideration of those factors, I conclude that the Baltimore City Police Department is not entitled to Eleventh Amendment immunity to suit under Section 1983. The reasoning is very similar to what was set forth in Alderman versus Baltimore City Police

Department, 952 F. Supp. 256 (District of Maryland 1997). The court notes that here as in Alderman, the Baltimore City Police Department had provided no evidence establishing that the state, not Baltimore City, would be responsible for paying any potential judgment and the Baltimore City effectively conceded that point and Baltimore City Police Department also has significant autonomy from the State with control primarily coming from Baltimore City which appoints the police commissioner. Baltimore City Police Department's functions are local primarily, not statewide. I don't find persuasive the arguments that there may be some stray areas where there's some jurisdiction beyond the city limits or that they enforce state laws.

The only factor that weighs in favor of immunity is that pursuant to Mayor and City Council of Baltimore versus Clark, 944 A.2nd. 1122 from the Court of Maryland 2008, the State of Maryland does view the Baltimore City Police Department as a state entity based on Maryland statutes for purposes of immunity from state law torts, but that does not apply to federal constitutional claims.

In looking at all these factors together under any weighting of these particular factors, that designation does not outweigh the other factors, particularly the payment of the judgment, the lack of

statewide impact of the department and the issue of control by either the state or city or autonomous control.

Notably, the Maryland Court of Appeals specifically stated in the context of Section 1983 that the classification of BCPD as a state agency is not controlling. It said that in Clea v. City of Baltimore, 541 A.2nd. 1303 (1988). Also I would note that in Blades versus Woods, 667 A 2nd. 917, the Court of Special Appeals expressly held that whatever state immunities Baltimore City Police Department may have, they do not extend to suits under 1983.

As a result, courts that have considered this distinction since Clark have reaffirmed the finding that Baltimore City Police Department is not subject to Eleventh Amendment immunity including Rockwell versus Mayor and City Council of Baltimore, 2014 Westlaw 949859 from 2014. The cases that have referenced otherwise as stated do not go through the four-part analysis that we've discussed. So the Court, therefore, concludes that as has been the case for many years, the Baltimore City Police Department does not have Eleventh Amendment immunity from suit. So we will consider the claims made by both defendants regarding the motion.

On the issue of statute of limitations, the defendants have acknowledged now or have conceded that

their position changes as a result of McDonough versus Smith, the recent Supreme Court case from June of 2019. So they are no longer arguing that Counts One and Two are subject to dismissal based on the statute of limitations. They do argue Counts Three, Four and Nine should still be subject to dismissal.

With respect to Count Three, the detention without probable cause, the plaintiffs have argued that McDonough still can be construed as applying to that case and extending the date of which the statute of limitations begins to run to the same date that would apply for Counts One and Two. I don't find that reasoning to be laid out in McDonough. McDonough does distinguish in talking about Wallace versus Kato, 549 U.S. 384 (2007), a distinction between false arrest claims such as in Wallace and malicious prosecution claims as in McDonough. And in this instance, the detention claim although perhaps expounded upon by the plaintiff beyond what's actually written in the complaint is much closer to a false arrest claim than it is to a malicious prosecution claim. It focuses on the period of detention. It is not focused on the actual prosecution of the case. And so the Court finds that it is still governed by Wallace. That the claim becomes ripe as soon as the individual is held pursuant to process here. Mr. Parks was arrested in 1999, proceeded to trial

in 2000. So he was held pursuant to process beginning in 2000. And therefore, his claim in 2018 was untimely. So Count Three will be dismissed based on the statute of limitations.

Counts Four and Nine are a different analysis. In Count Four, a Section 1983 claim for failure to intervene, in Randall versus Prince George's County, 302 F.3rd. 188 (Fourth Circuit 2002), the Fourth Circuit equated bystander liability, another term for failure to intervene to have parallels to accomplice liability. The Court accordingly finds that a failure to intervene claim accrues at the same time as the primary tort in which the bystander defendants allegedly fail to intervene, which in this case is the malicious prosecution claims which accrued on October 9, 2015.

So along the lines of how the Court would have analyzed that claim before McDonough or certainly after McDonough, I find that the failure to intervene claim follows the same track and is timely at least as pleaded. So the motion is denied as to Count Four.

On Count Nine, the officer defendants move to dismiss the or both sides -- both sets of defendants move to dismiss the intentional infliction of emotional distress claim. Under Parish versus City of Elkhart, 614 F.3rd 677 (Seventh Circuit 2010), which is relied on in

Prince George's County versus Longtin, 19 A.3rd. 859 (Maryland 2011), a court should determine the date when an intentional infliction of emotional distress claim accrues by looking at the crux of the claim. As in Parish, the crux of the claim here is a wrongful conviction based on withheld exculpatory evidence such that the tort was not completed prior to the conviction.

Accordingly, the claim could not have been brought by Mr. Parks before his conviction and the possibility of future prosecution being disposed of favorably along the same lines as the reasoning on Counts One, Two and Four at least. And so again the Court finds the date of accrual to be October 9, 2015 and the motion is denied on Count Nine.

As for the judicial estoppel argument, the officer defendants are arguing that Mr. Parks should be judicially estopped from proceeding in whole or in part on the allegations relating to the withholding of the Mueller report because his Petition for Writ of Actual Innocence or in that petition, he expressly asserted that the Mueller report was withheld by the prosecutors, not by police officers. Under Zinkand versus Brown, 478 F.3rd. 634 (Fourth Circuit 2007), judicial estoppel applies when three criterior are met. A party adopts a factual position inconsistent with the stance taken in prior

litigation, the inconsistent factual position is accepted by the court and the party intentionally misled the court to gain an unfair advantage. The last criterion is particularly important because as the Fourth Circuit made clear in Zinkand without bad faith, there can be no judicial estoppel.

Here, the Court finds that even assuming that the first two prongs were met, there are not the necessary indicia of bad faith to dismiss these claims at this stage of this case. Mr. Parks' essential contention remains consistent that there was material exculpatory evidence that was withheld from him resulting in his unjust conviction and incarceration.

It would not necessarily matter for purposes of the petition whether the prosecutor or the police officers were responsible factually for the ultimate withholding of the exculpatory report. So he did not gain any particular unfair advantage in that prior proceeding by using the factual approach regarding the prosecutor.

The inconsistency could be based on a number of factors, including whether or not the -- whatever might appear to be the argument that is at least most prevalent in the facts or most likely to succeed in gaining Mr. Parks' release, but that does not necessarily establish based on the pleadings that there was bad faith

or is bad faith in the use of the factual argument that's being made here. Notably, the petition itself did not characterize the police officer's role as innocent or completely unrelated to the alleged misconduct.

So under the circumstances at the pleading stage, I do find that there is no basis to conclude as a matter of law that there was bad faith and so the Court will not dismiss the complaint based upon judicial estoppel.

There was in the motion, although we didn't discuss it today, claims regarding qualified immunity. The officer defendants moved to have all of the claims dismissed on that basis. As the brief makes clear, the argument for qualified immunity hinges on the Court's finding that Mr. Parks was judicially estopped from arguing that they had withheld the Mueller report from the prosecutor. But where the Court has found no estoppel on this point, the qualified immunity argument can't succeed at this point because under Taylor versus Waters, 81 F.3rd. 429-436 (Fourth Circuit 1996), it was already established that a police officer who withheld exculpatory evidence from the prosecutor and therefore, deprived the defendant of a fair trial had violated due process rights.

The determination as to qualified immunity is made without prejudice as discovery may reveal facts

establishing that the police officers fulfilled the clearly established disclosure obligations of which they had reasonable notice. But the motion will be denied at this point.

On the issue of Local Government Tort Claims Act, the officer defendants move to have all of the claims -- state laws claims dismissed for failure to strictly or substantially comply with that statute. Under Section 5-304(b)(2) of the act, a plaintiff must give notice and writing of a potential tort claim by stating the time, place and cause of the injury. The notice must be given within one year of the injury. Here, the complaint alleges and the attached document shows that a letter was sent to the City Solicitor for Baltimore City in June of 2015 that summarized the wrongful prosecution and subsequent incarceration, which the Court finds constitutes the necessary notice under the statute.

The argument that the notice was provided before the injuries actually occurred or at least as a legal matter were ripe does not change the result. The point of the one-year requirement is to enable local governments to conduct their own investigations into tort claims while the evidence is still fresh.

Here, the underlying facts had already occurred. The Court, therefore, rejects the officer defendants'

argument that Mr. Parks' notice was untimely because it was premature. It was in keeping with the goals of the statute and therefore, the Court finds that even if it was deemed not strict compliance, it was substantial compliance which is permissible under Faulk versus Ewing, 808 A.2nd. 1262 (Maryland 2002).

Also in terms of the content, this two or three-page document, whether it mentions each individual defendant or not, the Court finds does satisfy the requirements of the particular statute.

On the broader arguments under 12(b)(6), first with respect to the individual officers' claims about improper group pleading, the Court will deny the motion on that issue for reasons similar to those in Burgess versus Baltimore City -- Baltimore Police Department, 2016 Westlaw 795975 (District of Maryland 2016). Mr. Parks has not yet had access to discovery. So he is not in a position to know what role various officers played in the investigation into the murder for which he was convicted. That is particularly true where the record shows some level of evidence withholding potentially or problems with record keeping and so the Court finds the allegations sufficiently precise to proceed to the next step of this case.

On the issue of the Monell allegations, there

are various theories under which this would proceed. The Court focuses though on the issue of whether there was sufficient facts alleged to establish a widespread practice of withholding evidence or fabricating evidence.

As another judge in this court found in Smith versus Baltimore City Police Department, 2014 Westlaw 12675230 (2014), pre-discovery, the numerous accounts of similar behavior are sufficient to establish a plausible inference of Monell liability under the pleading standard under the custom or widespread practice theory, particularly when included with the allegations based on the Tabeling Report. These series of prior incidents are based on facts occurring in the same timeframe including before this particular incident here. The report also refers to that as well. And so under 12(b)(6), the Monell claim is sufficiently pleaded.

However, the Court will find that the federal and state law conspiracy claims are barred by the intracorporate conspiracy doctrine, which dictates that officers and employees of the same entity acting in an authorized manner do not constitute separate actors for purposes of establishing a conspiracy.

The plaintiff doesn't seriously dispute that concept, but argues instead that the prosecutor could be deemed to be -- has been alleged to be a member of a

wider, extra corporate conspiracy. But in the complaint, the allegations are simply that the conspiracy extends to other individuals known and unknown within and without the BPD.

The argument now is that that includes or focuses on the prosecutor. For one thing, it's not in the complaint. But and therefore, that in and of itself is a reason to dismiss those claims. But the Court notes also that where Mr. Parks' more recent theory of prosecutorial involvement is in tension with this or even contrary to this theory, the lack of any particular allegations to spell this theory out, lead to the conclusion that the allegations do not support an inference of conspiracy outside the police department even if one were arguing it in the alternative.

To the extent that discovery may reveal facts that renders a conspiracy allegation viable, the complaint can be amended at that point. But for now, the Court will dismiss the federal and state conspiracy claims.

Finally, on the issue of the indemnification claim in Count Twelve because some of the claims against the officer defendants remain viable, the issue is simply this argument that was raised by the defendants, A, that there might be sovereign immunity, also that there -- it may be premature to make this assertion at this point.

First off, the waiver of immunity or the state sovereign immunity is effectively waived for claims to -- of a duty to defend or indemnify an employee under Baltimore Police Department versus Cherkes, which is 780 A.2nd. 410.

And then in terms of whether we are now at the point where this can be alleged, the Court disagrees with the analysis offered regarding Johnson versus Francis, 197 A.3rd. 582, (Maryland Court of Special Appeals 2018). That case does make clear that the or rejects the theory that the officer must assign the claim before a plaintiff can pursue a claim against the department directly. Rather the case focuses on the notion that a plaintiff must be able to recover from a local government without the need to first obtaining an assignment from the employee who wronged him or her. And so the Court does not accept the notion that there are predicates to an indemnification claim that have yet to occur or have to have been asserted obviously. Again, evidence must be established to lay out all of the different pieces that would lead to an indemnification claim. But the Court will deny the motion on Count Twelve.

I believe that covers all the issues in the motions. There will be an order issued that memorializes the various rulings on these various counts.

Ordinarily, we would move then to standard

discovery. But we also have this letter that was submitted on August 30th seeking to file a motion to dismiss as a litigation sanction based on fabrication.

And I guess the question that I wanted to ask was to the extent that this would be a basis to dismiss or impose some other sanction, it seems as if it's a fact-based issue that focuses on things such as whether a document was fabricated, there's proffers that there's expert testimony that would establish these facts. How does one dismiss a case that has a fact-based argument until we develop the facts?

So let me ask whoever from the defense side wants to raise this issue. I certainly have no problem with the idea of trying to proffer a theory, but is this the right time at this point?

MR. NATHAN: Your Honor, would you like me to address the Court from the --

THE COURT: Maybe, yes, because the -- either that or pull the microphone closer.

MR. NATHAN: Good morning. To address your question directly, I think there is some limited fact discovery that does need to be -- does need to take place and the parties have conferred after we sent the letter over to plaintiff.

If I may just give a brief introduction to what

we believe the motion is going to show. And we will be attaching factual support for that and we anticipate that the plaintiff will want to conduct some limited discovery on that issue and we are going to want to conduct some discovery on the issue as well.

As we heard this morning and the Court is well aware at this point, the complaint -- the plaintiff vacated his conviction primarily based on this Mueller report or exclusively based on this Mueller report. And that's well established from the petition for writ of innocence.

The plaintiff's complaint also strongly relies on this Mueller report in numerous places and we've talked about that this morning as well.

THE COURT: So I mean the process here and I understand only some but not all of the judges use the process where we've laid out here with the letter. Again I'm really more concerned with timing. This isn't an opportunity to argue the merits of this motion and I can obviously read the letter. So I know what the contours of it are. So again you've said that both sides want discovery on this. So why would you file a motion now until after that occurs?

MR. NATHAN: Because we think that this is an important enough issue that the Court should be made aware

of it, number one, and, number two, discovery should focus preliminarily in this case on this issue first.

These types of cases tend to explode into 30, 40 depositions. That could happen. Thousands of pages of discovery which is extremely costly. And our strong belief here is that the Court is going to view the two experts that we have here as credible and that will be establishing that this entirety case is based on a forged document. And therefore --

THE COURT: That no one discovered during the motion to vacate?

MR. NATHAN: In this -- in state court?

THE COURT: Yeah. Again, I don't want to argue the merits of this. But it seems a little strange that you have a convicted murderer and the state has a detective who is accused of forging a -- of withholding a report and he's involved and no one comes out and says this must be a forgery? It seems somewhat incredible that the detective himself wouldn't have said I never wrote this.

MR. NATHAN: We were not a party to that proceeding, Your Honor.

THE COURT: Who is we?

MR. NATHAN: The defendant police officers is who I represent. But the Baltimore Police Department was

also not a defendant in that proceeding. However --

THE COURT: Was Detective Mueller involved in that in some way?

MR. NATHAN: Your Honor is referencing Officer Mueller.

THE COURT: Officer Mueller.

MR. NATHAN: And what I believe happened in that proceeding is that that report, the so-called Mueller report was presented to him and said is that your signature and he looked at it and he said I have no recollection of this document at all. And he's not a detective involved in the case. He just responded to the scene. So it's not -- he didn't have an intimate recollection of this event. He says yes, that looks like my signature and he maintains it looks like his signature and the expert --

THE COURT: But the whole time that this person is trying to get out of prison for this murder conviction, he never says, you know, I actually didn't interview this person or whathaveyou, the contents are not accurate whether I remember it or not. I mean that didn't come up?

MR. NATHAN: He did not testify and no, it didn't come up. He said he had no recollection of this at all. And he maintains that. But what we're saying is that it's not surprising at all that he would authenticate

his signature because it is in fact his signature --

THE COURT: Okay. Fine. I understand the point. So again what I'm concerned about is you want to file a motion with no discovery as you said. And why wouldn't we take the discovery first. It sounds like maybe what you're asking for is to sequence discovery in a particular way such that at some point when you have enough information on this issue, you could file a motion and perhaps head off some of the other parts of the case --

MR. NATHAN: Whichever direction Your Honor prefers would be fine with us. Whether we should file the motion to focus the issue first and then we can focus discovery around that or I think we've already tendered our two expert reports to plaintiff and I think we can come up with a structured discovery without pre-filing the motion. That also I hear that as being a similarly efficient way to deal with it because scope of the issues may vary a little bit and then ripen for the Court. So I would be happy to proceed either way.

THE COURT: Okay. Let me hear from Ms. Horn.

MS. HORN: Thank you. Your Honor, I mean I'm not going to go into the merits of this other than to say that we vigorously contest any assertion that it's a fraud. What I will say is --

THE COURT: You would agree it sounds like that to the extent it's a factual issue, that discovery of some kind would be needed before we --

MS. HORN: Your Honor --

THE COURT: -- resolve this question?

MS. HORN: Absolutely. First of all, the expert reports that they did tender to us after we wrote to them and said, hey, why don't you guys at least try to confer with us, those expert reports were written in March of 2019. Why there is this sudden urgency six months later to come to court and say we've got to dismiss the whole case or alternatively, we need to structure discovery to address this issue is somewhat -- I don't understand it.

And to the extent that they're relying on expert reports, that's a matter of expert discovery. If they want to present to a jury that their experts to the extent that they pass the Daubert threshold are alleging that parts of this document are a fraud, so be it. But that's really an issue for expert discovery. And they can't leapfrog the ordinary way in which discovery proceeds simply by coming up with this motion.

I will say to the extent they want to structure discovery, I think what's going to end up happening is we're going to have fights over whether this discovery actually goes to this issue of fraud or whether it goes to

something bigger, you know, some other issue in the case. Just think about plaintiff's deposition. Are they only going to get to ask him questions about the particular fraud? Are they going to get to ask him questions more globally about what he was doing on July 16, 1999?

So I think the idea of structuring discovery is not well taken given the nature of what they are asking for. To the extent that they are relying on expert reports, we can address that during expert discovery and --

THE COURT: Well, let me ask you this, Ms. Horn. You would acknowledge at least that whether it's for some separate motion to dismiss the case or just for the case overall, if they want to make some argument or develop an argument that the document was forged in some way, that that's something they should be able to try to pursue in discovery. Correct?

MS. HORN: Absolutely, Your Honor. We're certainly not saying that they can't pursue this defense in discovery and it sounds like in particular in expert discovery.

What we're saying is that it doesn't make sense to structure discovery around this issue that they have come up with and alleged as an emergency. These expert reports were done in March of 2019. That was actually

during the briefing on the motions to dismiss if they thought that this was such an imperative issue to raise to the Court.

So I think we can take this issue up in discovery just as we would any other issue or defense that they want to raise.

THE COURT: Well, what I would like to do I think is -- as I said, ordinarily, we would talk very soon about a schedule and there's a standard schedule and the parties often want to adjust the schedule. It's not unusual for parties in certain cases to try to put some structure around the schedule. Sometimes there's threshold issues or otherwise. That's not an unusual issue.

The nature of this type of case is such that as has been said, the discovery may be somewhat extensive. But that cuts both ways. On the one hand, some can be avoided if there's a reason to just pull the plug on the case overall. At the same time, if there is no reason, then that will just extend the life of the case for a very, very long time on a case where the facts are already quite old to start with.

And so what I would propose is that we -- first off, I don't see any reason or I don't see how this motion is even ripe until we know what the facts are and both

sides seem to agree that there is some need for discovery for that. So I would ask that the motion not be filed until after sufficient discovery has been had, that both sides recognize that this issue can be teed up.

I don't conclude that it has to wait until trial. There may be a reason once enough information has been developed for a motion of some kind to be filed along these lines. But I also don't want to hold up the rest of the case over that. So what I would suggest is we move into discovery, this be one of the issues that's the subject of discovery. And when enough information has been developed on this issue that both sides feel that it can be properly litigated, even if the plaintiff's position is that it should wait until the trial, I think certainly you can renew the letter at some point once you have what you need to prove this issue if you think you can prove it and then we'll set a schedule for that at that point.

Now Ms. Horn points out the significant likelihood that the parties would be fighting it out over what's the sequence of discovery. That naturally, the defendants would want to focus only on these issues first even if it's not ordered by the Court. But just as a practical matter, there is limited band width and both sides want to focus on what they care about the most and

the plaintiffs will probably try to resist that. So I see that as a potential problem.

I would ask the parties though to meet and confer and try to develop a schedule that would accommodate the potential for this issue to be addressed separately before trial. And so I think what that would mean is that discovery on these issues should not be put to the end. They should be handled relatively early in the process. But at the same time, there needs to be some accommodation for the fact that this is an old case factually even if it's only been filed a year ago and that other aspects of discovery need to move forward. And so making sure that both tracks are fairly being pursued, I think is the appropriate way to go.

Obviously, if there are expansive times consuming parts of discovery that the parties can agree should wait until the end which would normally be the case in almost any case regardless of this issue, that might be a way to help determine what happens earlier. But I think we should proceed on both fronts with the understanding that at some point if the facts break out the way that the defendants want to, that they would then potentially file a motion before we get to the end of discovery if -- or all discovery, ideally at the end of discovery on this issue to make the arguments they want to make.

MR. NATHAN: Your Honor, may I respond?

THE COURT: Yes. Just pull the microphone closer to you.

MR. NATHAN: If it's okay, I'm just going to stand here.

First, just to address that not charge of delay, but that comment of the delay. The reports were from March. As Your Honor can imagine, when we first saw the case, this was an issue we looked at and you noted that right away. You said didn't anyone look at that and that's exactly what happened when we said this. Let's look -- when we first saw the case, we said let's look at these documents.

At the same time, it's a serious allegation to be making. We understand that and we wanted to fully vet it. And we were preparing to file a motion today or tomorrow. And we remain prepared to file that motion and we needed to include other evidence in order to establish the basis for that motion. We anticipated that some discovery may be necessary and that's why we shared the reports with counsel and wanted to discuss with them what type of discovery would be necessary for the Court to fully understand the entire picture in order to make a ruling. Given --

THE COURT: Wouldn't this likely require some

live testimony? If you're really going to get the case dismissed, am I really going to just decide based on a written report without live testimony from experts and perhaps contemporaneous witnesses to these events?

MR. NATHAN: You're correct, Your Honor. The way that we wanted to proceed and I think we should proceed is we should file our motion which we've prepared for and that will lay out the scope of our allegations relating to this document.

We can listen to the plaintiff's experts to rebut that. We can have maybe one or two interrogatories or requests for production relating to these issues alone. Maybe -- we could discuss whether this is necessary -- maybe a 30-minute to 45-minute deposition of the plaintiff relating to only this issue and the Court after seeing the briefing and the attachments here could decide if it needed to hear live evidence on this. It's an important enough issue where this man was --

THE COURT: Why isn't the complaint an important enough issue? This isn't the only issue in the case. That's all I'm saying is why are we hijacking the whole case over one issue?

MR. NATHAN: Certainly, the --

THE COURT: Again an issue that if it really -- I mean it should have been discovered back in -- 15 years

ago. I mean I'm not saying that you can't prove it. I'm just saying that given the history of this case, I'm not sure this is the kind of thing that we drop everything to address given all the reasons why this could have been dealt with many years ago.

MR. DAVIS: Yes, Your Honor. I may be out of order and you'll let me know. But with your indulgence, I'd like to address the Court. And I understand if you'd rather not, but this is very important.

THE COURT: I think to have the City Solicitor who's not seated at counsel table take an issue that counsel is already pursuing -- let me ask you, Mr. Amato, is it or Mr. Conroy?

MR. NATHAN: It's Shneur Nathan, Your Honor.

THE COURT: Okay. I'm sorry. You're not on my list. But in any event, do you represent the individual defendants or do you represent the City or both?

MR. NATHAN: I represent the individual defendants, Your Honor.

THE COURT: Well, I will let the City be heard on this issue. It's one counsel per matter. And I think Ms. Lynch has been representing the City up to this point. I only want to hear from any attorney who has entered an appearance in this case. Who is going to be heard from the City on this issue, anyone who has entered an

appearance in this case if the City wants to be heard?

MR. NATHAN: Your Honor, may I confer with Mr. Davis for a moment?

MR. DAVIS: Never mind. I don't want to hold things up, judge, and I respect the Court's ruling. Never mind.

THE COURT: So, Ms. Lynch, do you want to add anything on this point or --

MR. DAVIS: No, Kara. No, Kara.

MS. LYNCH: No, Your Honor.

MR. NATHAN: Your Honor, may I add one more thing?

THE COURT: Yes.

MR. NATHAN: Your Honor noted that why wasn't this brought up sooner back in 2015, I just wanted to -- 15 years ago and I wanted to correct just the factual point. This document that we allege was completely forged, we are saying it was forged when Mr. Parks brought it out much later. That's not 15 years ago. He is saying -- the question -- it is strange that he --

THE COURT: Wait. Say that again. When was it forged?

MR. NATHAN: It was forged at the time that he attached it to his petition for writ of innocence saying I suddenly found this document.

THE COURT: Right.

MR. NATHAN: And he says that he got it by issuing a Freedom of Information Act request to the circuit court and received it in a stack of documents sitting in his cell together with other police reports which he -- so he says I didn't notice it for some time. I think he says the particulars are about a year or so and I'm being a little bit loose on that fact. "Until oh, I notice, a-ha, I have a document that shows -- that ticks every box in my writ of petition for innocence that I need to file." And now we have two experts that are saying this document is a forgery. This is --

THE COURT: Again where were these experts when the man was being released?

MR. NATHAN: We were not a party to the case, Your Honor. We had no say in that. We did not hear it. We had no opportunity to look at it.

THE COURT: Officer Mueller was basically being accused of being part of some sort of misconduct, wasn't he?

MR. NATHAN: Officer Mueller was interviewed by someone from the State's Attorney's Office, some representative without counsel and all he said was -- they said is this your signature and he said, yeah, it is because it is. It's an --

THE COURT: Okay. I think I've basically ruled on this issue. Okay. I mean I've set a -- we haven't set a firm schedule. I've said that this issue can be dealt with before trial when it's ripe when the discovery has occurred. If you file a motion now, you are going to have to amend your brief at some point anyways to incorporate either new facts you gain in discovery or at least to address the facts that the plaintiff elicits on discovery.

So rather than getting into multiple rounds of briefing, the first preliminary round and then the post discovery round, I think it's wise to do this all in one fell swoop.

MR. NATHAN: I'm not rearguing it. I understand that, Your Honor. But the other proposal that I was saying is that we would file the motion and we could have an evidentiary hearing on it and there would be one issue for the Court to resolve.

And we strongly feel that that is the correct course because it's -- based on a forged document, if we are forced to defend this entire case with essentially millions of dollars of costs and fees involved, there's no reason to prejudice the City of Baltimore like that.

MS. HORN: Your Honor, may I?

THE COURT: Yes.

MS. HORN: I think what counsel, Mr. Nathan has

said just highlights that this is an issue of fact discovery and actually an issue of expert discovery because what he said is we are relying on two expert reports that indicate that this document is a fraud. And we've reviewed them and we'll save our differing views of what those expert reports say and the validity of them for another day.

But I think the concern that we have with going down the road that he's suggesting is that he has hijacked this case that was properly pled so that they can pursue their defense.

And what I anticipate happening in discovery is objections to discovery that we take fights over who goes first or what issues go first. And because this is going to require us to hire our own expert and we don't have access to this other evidence that he's talking about that purportedly shows that this document is a fraud, my strong recommendation would be that we conduct discovery the way discovery is normally conducted. They, of course, can do discovery on their defense as they would any other defense. We get through expert discovery where we have the opportunity with all of the documents, the live testimony, other reports by this officer to hire our expert to counter theirs and this Court can make a determination of whether it's just an issue of fact for

the jury, which the more he talks, the more it sounds like to us.

THE COURT: Okay. So I don't want to hear any more on this. I think I am where I was before, which is that you file a motion. The answer is going to be we don't have enough information to defend this and they're right and so it's premature. If you want to file it, you can. But the likely ruling will be it's premature and it will be denied without prejudice. And the amount of resources on both sides to deal with a premature motion in the courts is really not worth it if you ask me.

I would -- as I said, we'll proceed to discovery. This is an issue if after discovery on this issue, it can be fully briefed and argued and/or if we need an evidentiary hearing, we can do that in advance of trial. I'm not going to agree with Ms. Horn that this is something that has to go to trial to be resolved depending on what is found. You may have an expert who agrees or disagrees with their position. We just don't know at this point. I don't know at this point. And so this is something that will be part of discovery and it will be something that should be towards the front end of discovery. My point just being as I am sensitive of the idea of someone just hijacking this case.

So the parties have to agree on a schedule that

accommodates discovery on this issue and other issues and you can debate and discuss which issues are priorities to the plaintiff and this is obviously an issue of priority to the defense and that's where the first round will occur. And I would ask the parties to propose a schedule in terms of expert issues regarding this issue and anything else that can be laid out in the schedule. Obviously, if there are disputes which there may be, then the schedule can be adjudicated. But I'd ask the parties to try to meet and try to reach an accommodation in the first instance.

And then again once the materials are pulled together, whether your expert has been appropriately deposed and whether Ms. Horn finds an expert and you've had a chance to vet that expert and if there's any other fact evidence that needs to be had regarding this, once that's all compiled, then it would make sense at that point to file a motion for whatever result you think is appropriate at that point and we can address it then again short of in advance of trial.

So if you want to get these facts discovered quickly, then you can propose a quick schedule. But you will also have to be willing to work to give some discovery to the plaintiffs on their most important issues in the same timeframe and maybe that's ideal for everybody

because I think we always want to move these cases as quickly as possible.

So I think the way this usually works is I issue a scheduling order. I don't think I'm prepared at this point to negotiate and adjudicate discovery schedule issues. So I'll issue that with the standard instructions. But rather than having a conference which is what we usually do at this stage to iron out minor differences in the schedule because this schedule will require a little more tinkering and discussion and I would likely ask the parties to submit a joint status report in let's say 14 days out to either submit a proposed new schedule or if for some reason that can't be agreed to, then laying out what the issues are from a scheduling standpoint and then we can go from there. Anything else on that or other issues?

MS. HORN: Nothing from the plaintiff, Your Honor.

MR. NATHAN: Nothing from the individual defendants.

THE COURT: Okay. Thank you very much.

(Proceedings concluded.)

CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the motions hearing in the case of the Garreth Parks versus Baltimore City Police Department, et al., Civil Action Number TDC-18-03092, in said court on the 6th day of September, 2019.

I further certify that the foregoing 104 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 24th day of September, 2019.

Lisa K. Bankins

Lisa K. Bankins
Official Court Reporter